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# **In the Supreme Court of the United States**

OCTOBER TERM, 1959

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No. 39

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED  
STATES DEPARTMENT OF LABOR, PETITIONER

v.

ROBERT DEMARIO JEWELRY, INC., ET AL.

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIFTH CIRCUIT*

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**BRIEF FOR THE PETITIONER**

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## **OPINIONS BELOW**

The findings, conclusions and decree of the District Court (R. 7-13) are not officially reported (13 WII Cases 709). The opinion of the Court of Appeals (R. 14-23) is reported at 260 F.2d 929.

## **JURISDICTION**

The judgment of the Court of Appeals was entered on November 7, 1958 (R. 23). By order of Mr. Justice Black, dated January 23, 1959, the time for filing a petition for a writ of certiorari was extended to and

including March 6, 1959. The petition was filed on March 3, 1959, and was granted April 20, 1959 (R. 33). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

#### QUESTION PRESENTED

Whether, in an action by the Secretary of Labor under Section 17 of the Fair Labor Standards Act, the district courts have power, ancillary to the authority "to restrain violations," to order reimbursement for loss of wages resulting from the discriminatory discharge of employees in violation of the Act.

#### STATUTE INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U.S.C. 201, *et seq.*), are set forth in full in the Appendix, *infra*, pp. 41-43. The provisions particularly involved are Sections 15(a)(3) and 17, which read as follows:

SEC. 15. (a) \* \* \* [I]t shall be unlawful for any person—

\* \* \* \* \*

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

\* \* \* \* \*

SEC. 17. The district courts, together with the District Court for the Territory of Alaska, the

United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands shall have jurisdiction, for cause shown, to restrain violations of section 15: *Provided*, That no court shall have jurisdiction, in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

#### STATEMENT

This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act to enjoin the respondents from discriminating against their employees in violation of Section 15(a)(3) of the Act, and to require them to reinstate three employees discharged in violation of that section and to reimburse them for wages lost as a result of their unlawful discharge.

On November 14, 1956, respondents were convicted, upon a plea of guilty in a criminal action, of having violated the Fair Labor Standards Act by underpaying their employees and failing to keep proper records (R. 25-31). Two days later, they learned that the three employees involved in the instant case had requested the Department of Labor to bring suit for the amount of the underpayments (Fdg. 3; R. 8). Respondent DeMario, "[i]mmediately after the service of said suit," being "disturbed, excited and displeased with the three employees named because of their having authorized the bringing of said suit," protested to each of them in individual interviews held the same day (Fdg. 4; R. 9). "Because of the [respondents']

displeasure over the filing of \* \* \* suit," they "immediately" entered upon a course of discrimination against the complaining employees (Fdg. 6; R. 9). "This discrimination manifested itself in several ways including the changing of seating arrangements of these employees on the following Monday morning, November 19th, giving them less desirable locations or positions in the plant, changing the particular type of work assigned to them, giving instructions that they were not to leave their seats except to go to the restroom and generally finding fault with their work" (Fdg. 6; R. 9). Following about two weeks of this kind of discrimination, their employment was terminated by respondents (Fdgs. 7-10; R. 9-10).

The trial court found that all three employees "were, relatively speaking, long-term employees of defendants", particularly two of them who had worked "continuously" for respondents longer than most, if not all, of respondents' employees (Fdg. 5; R. 9); that "[n]o complaints had ever been made against the work of any of these three employees" (Fdg. 9; R. 10); and that they "would not have been laid off if it had not been for the filing of said suits, or if they had been laid off they would have been reinstated long since" (Fdg. 10; R. 10). It concluded that the respondents had thereby violated Section 15(a)(3) of the Act, which forbids discrimination against employees for resorting to the Act's procedures (Concl. 3; R. 11).

On these findings, the trial court issued a decree enjoining respondents from violating Section 15(a)(3), and requiring them to offer reinstatement to the three employees. However, although expressly concluding

that the "evidence of discrimination is clear and convincing" (Concl. 4; R. 11), and without finding any mitigating circumstances with respect either to the unlawful discrimination or to the resulting wage losses, it declined, "in the exercise of the Court's discretion," to order the respondents to reimburse the employees for wages lost by them as a result of the respondents' unlawful conduct (Concl. 5; R. 11-12).<sup>1</sup>

The Secretary appealed from the denial of reimbursement, and respondents cross-appealed from the judgment of reinstatement. The Court of Appeals affirmed, sustaining the trial court's authority to issue the reinstatement order as relief ancillary to the injunction authorized by Section 17 (R. 23), but holding that the trial court had no corresponding authority to issue a reimbursement order (R. 19). It, therefore, concluded that the question whether denial of such relief, on the facts found, exceeded the bounds of sound discretion "is not reached" (R. 23).

In sustaining the denial of the reimbursement order, the Court of Appeals noted the enactment in 1949 of the proviso in Section 17 expressly denying jurisdiction to issue specified types of orders for the payment of restitution to employees (R. 17).<sup>2</sup> However, ob-

<sup>1</sup> At the time of the entry of the District Court's decree (October 8, 1957; R. 13), almost a year had elapsed since the discharge of the employees. The undisputed evidence shows that one of the three employees (Elizabeth Duke—the one found by the trial court to have been a particularly "long-term" employee of respondents and an "above the average" worker, Edgs. 5, 9; R. 9, 10) had been unemployed at all times since her discharge, although she had actively sought employment and was at all times ready and able to work (Tr. 34-35, 297).

<sup>2</sup> Fair Labor Standards Amendments of 1949, c. 736, 63 Stat. 910, 920. The proviso reads: "Provided, That no court shall have juris-

serving that "the proviso \* \* \* dealt solely with the minimum wage and overtime compensation provisions" (R. 20), the court expressly disclaimed reliance on the proviso as a ground of decision. It rested its ruling upon the basis that, regardless of the proviso, there was no jurisdiction to grant reimbursement orders for losses resulting from discriminatory discharges (R. 21).

#### SUMMARY OF ARGUMENT

The decision below ignores both the purpose of the specific statutory prohibition of discrimination (Section 15(a)(3), *supra*, p. 2) and the basic policy of the Fair Labor Standards Act, in narrowly reading the jurisdictional language of Section 17—"to restrain violations of section 15[(a)(3)]"—to exclude the power to order reimbursement for wage losses due to unlawful discrimination. In repudiating the Second Circuit's decision in *Walling v. O'Grady*, 146 F.2d 422 (which read Section 17 to include such reimbursement power as "a necessary power adequately to carry out the [Act's] prohibition \* \* \* against a discriminatory discharge," *id* at 423), the Fifth Circuit relies on reasoning plainly inconsistent with the statutory purpose and policy and contrary to the fundamental principle of statutory construction controlling here.

#### A

The legislative purpose and "main object" of the Act's prohibition against discriminatory conduct (Sec-

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tion, in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action."

tion 15(a)(3)) is to effectuate the minimum labor standards prescribed in the Act's substantive provisions, and thereby to achieve the declared policy "to correct and as rapidly as practicable to eliminate" "conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and well-being of workers" (Sec. 2). In recognition of the practical fact that effective enforcement would be virtually dependent upon the willingness and freedom of employees to participate as claimants and witnesses, and aware of the powerful intimidatory economic pressures inherent in the employment relationship (particularly for the low-wage workers with whom this Act is primarily concerned), Congress was not content merely to provide enforcement procedures for violations of the substantive statutory standards themselves. The further prohibition against discriminatory retaliation was established for the purpose of "protecting the exercise by workers of full freedom \* \* \*" to participate in such enforcement procedures without fear of economic loss at the hands of their employers (*cf. Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 182-183)—so that employees would be protected "not merely in the exercise of their \* \* \* [substantive rights], but against the economic consequences of a legitimate assertion of those rights" (*cf. National Labor Relations Board v. Killoren*, 122 F.2d 609, at 612 (C.A. 8), certiorari denied, 314 U.S. 696).

It is commonplace that the prospect of permanent loss of several months' pay may be just as effective as the fear of permanent discharge to deter employees from asserting their statutory rights or cooperating

with the enforcement authorities. Simply to forbid new discriminations in the future and to order reinstatement of unlawfully discharged employees, without redress for the severe damage resulting from loss of wages for a long period of unemployment, falls far short of giving the employees the protection and assurance necessary to meet the problem to which Section 15(a)(3) is addressed. Under the decision below, the lesson, not only to the particular employees discharged, but also to the remaining employees, and ultimately to all employees subject to this Act, is that it can prove very costly for an employee to seek redress through the legal procedures provided by the statute. Without assurance that the economic loss incurred by the employee for claiming his rights will be undone, resort to the procedures of the Act becomes a gamble in which the employee is required to risk irremediable loss of all wages for an unpredictable period of unemployment, in order to gain restitution of partial deficiencies in wages due for past periods of employment. The ruling below thus vitiates the force of Section 15(a)(3) and operates to undermine the administrative and enforcement procedures essential to attainment of the basic statutory policy.

## B

1. The premise on which the Fifth Circuit's decision rests—that the reimbursement remedy is unavailable unless “expressly conferred by \* \* \* or \* \* \* necessarily implied from a congressional enactment” (R. 19)—is diametrically opposed to the fundamental general principle that when a court's equity jurisdiction is invoked under a regulatory statute, its inherent equitable powers are available “to give effect to the

policy of Congress" and "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." See *Porter v. Warner Co.*, 328 U.S. 395, 398, 400. The application of this principle does not depend upon congressional authorization of specific types of equitable remedies or use in the statute of special phrases such as "effectuate policies" or "enforce compliance" or "issue necessary orders." In particular, this Court's decisions dealing with labor relations statutes and the anti-trust laws (discussed *infra*) demonstrate beyond doubt, not only that general statutory authority "to restrain violations" suffices to invoke the equitable jurisdiction to order affirmative relief to "neutralize" or "rectify \* \* \* existing wrongful conditions," but also that the reimbursement remedy, no less than reinstatement, is essential to achievement of this Act's prohibition of discriminatory conduct and to effectuation of its basic substantive policy.

2. Decisions dealing with the closely analogous legislative policies and prohibitions of other labor statutes have long and consistently recognized that the reimbursement remedy is as essential as reinstatement to achievement of the purpose of the statutory prohibition of discrimination and "vindication of the [Act's] public policy." See *Phelps Dodge, supra*, 313 U.S. at 197. As the Labor Board cases put it, restoration of wage losses, if not always an essential adjunct to reinstatement, is certainly the traditional appropriate "companion remedy of reinstatement," effectuation of the statutory policy depending upon "the

practical interplay of [the] two remedies" (see *National Labor Relations Board v. Seven-Up Co.*, 344 U.S. 344, 348). This Court's decisions have repeatedly recognized that the Labor Board's experience shows that effectuation of the labor policy which the Board enforces "generally requires" both remedies, because "[o]nly thus can there be a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination" (*Phelps Dodge, supra*, at 194; *Seven-Up*, at 345; *Republic Steel Corp. v. Labor Board*, 311 U.S. 7, at 10). "Such a restoration of the situation as it would have been had the unfair labor practice not occurred is obviously needed to wipe out the coercive effect of the employer's conduct." See *National Labor Relations Board v. Waumbeec Mills*, 114 F.2d 226 at 235 (C.A. 1).

That the courts' power to order reimbursement as ancillary to an injunction does not depend on specific statutory authorization—such as the National Labor Relations Act provides with respect to back-pay—is evident from the Court's decision in *Texas & N.O.R. Co. v. Railway Clerks*, 281 U.S. 548, which sustained reinstatement with a back-pay order, as an appropriate measure "to enforce the legislative policy against discrimination represented by the Railway Labor Act \* \* \*", "[e]ven without \* \* \* a mandate from Congress" (see *Phelps Dodge*, at 188). The absence of explicit authorization of such remedies in the Fair Labor Standards Act merely reflects the fact that enforcement of this Act, like the Railway Labor Act and the Anti-Trust Act, is directly entrusted to the pre-existing system of courts already in possession of traditional equity powers requiring no confirmation—in contrast to an administrative agency or board created

by statute and having only such powers as the legislation specifically confers.

3. The anti-trust decisions demonstrate that the exercise by equity courts of power to issue affirmative orders similar to, and fully as broad in scope as, the Labor Board's orders does not depend upon express statutory authorization to grant such relief or specific direction to "effectuate the legislative policies" of the Act. The jurisdiction conferred by the Anti-Trust Act to "prevent and restrain violations"—language precisely equivalent to that of Section 17 of the Fair Labor Standards Act—has always been construed as including "the duty to enforce the statute" by "the usual powers of a court of equity to adapt its remedies" to the execution of the statutory policy, including "the application of broader and more controlling remedies" than the mere "prohibition of future acts" (*United States v. United States Steel Corp.*, 251 U.S. 417; *United States v. Crescent Amusement Co.*, 323 U.S. 173). Significantly, the standards for determining the scope of affirmative relief authorized in anti-trust decrees have been stated in terms virtually identical to the standards applied in the Labor Board cases, i.e., to "neutralize," "wipe out," or "undo" the continuing effects of past unlawful conduct, and to "redress" wrongs and restore "as near as possible \* \* \* the [prior] status quo" (*Standard Oil Co. v. United States*, 221 U.S. 1; *United States v. American Tobacco Co.*, 221 U.S. 106; *International Boxing Club v. United States*, 358 U.S. 242). Anti-trust decisions have sustained various kinds of affirmative orders, including "quite drastic measures to achieve freedom from the influence of the unlawful restraint" (see *United States v. Bausch*

*& Lomb Optical Co.*, 321 U.S. 707, 726), none of which was within powers "expressly conferred" by the Anti-trust Act, or "necessarily implied" by any specific provisions of that Act, as would be required by the test laid down by the court below.

Nothing in the language, context, or legislative history of the Fair Labor Standards Act supports the ruling below that the general principle applied in these labor relations, anti-trust, and price-control cases is not equally applicable to the jurisdiction granted by this Act to restrain discriminatory conduct prohibited by Section 15(a)(3).

### C

In particular, the proviso added to Section 17 by the 1949 amendment, *supra*, p. 3 (withdrawing equitable jurisdiction "to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages") does not, by its terms or legislative intent, restrict the courts' jurisdiction to order reimbursement for wage losses resulting from discriminatory discharge. As the court below itself noted, in expressly disclaiming reliance on the proviso, its terms deal "solely with the minimum wage and overtime compensation provisions" (R. 20). The legislative history shows that the language of the proviso was intentionally limited to the specified types of restitution orders, and contradicts the inference drawn by the court below that the legislative aim was to deprive the courts of all power to order reimbursement of any kind. The only proper inference to be drawn from the language, context, and legislative history of the proviso is that its enactment in such limited specific terms

constituted a confirmation, rather than a repudiation, of the earlier *O'Grady* decision approving reimbursement for loss due to discrimination (*supra*, p. 6).

Unlike "unpaid minimum wages or unpaid overtime compensation" (for recovery of which other remedies are authorized by Sections 16(b) and 16(c)), no relief is available at all under the Fair Labor Standards Act for financial loss resulting from unlawful discharge, if it is not available under Section 17. There is thus special reason for application here of the principle that the courts' "equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command" (*Porter v. Warner*, *supra*, 328 U.S. at 398), and there is no warrant for straining to draw the unsubstantiated inference that Congress intended (either initially or in 1949) to bar the essential reimbursement remedy for damages resulting from prohibited discriminatory conduct.

#### ARGUMENT

**The Jurisdiction Granted by Section 17 of the Fair Labor Standards Act "to Restrain Violations" Includes the Power to Order Reimbursement for Loss of Wages Resulting from Unlawful Discriminatory Discharge of Employees in Violation of Section 15(a)(3) of the Act**

Without consideration of the objectives of the Fair Labor Standards Act's prohibition against discriminatory discharge (Section 15(a)(3), *supra*, p. 2), the decision below narrowly reads the general jurisdictional language of Section 17—the district courts "shall have jurisdiction, for cause shown, to restrain violations of section 15" of the Act—to exclude the power to order reimbursement for loss of wages due to discrimination, thus repudiating the Second Circuit's 15-year-old decision in *Walling v. O'Grady*, 146 F. 2d 422,

which held the reimbursement remedy to be "a necessary power adequately to carry out the prohibition of the Fair Labor Standards Act against a discriminatory discharge" (*id.*, at 423). Although the Fifth Circuit opinion suggests that the enactment of the 1949 proviso to Section 17 (*supra*, p. 3) might be construed as a legislative repudiation of the *O'Grady* decision, the court expressly refrained from so holding (R. 20), and deliberately rested its ruling on the premise that judicial power to order monetary reimbursement has always been lacking under the Fair Labor Standards Act (R. 19). We submit that both the ground on which the court chose to rest its decision and its suggestion with respect to the proviso added to Section 17 by the 1949 amendment are erroneous, and that the *O'Grady* decision was, and still is, the correct and sound view of the jurisdiction granted "to restrain violations" of Section 15(a)(3).

### A

*The purpose of the specific statutory prohibition against discriminatory conduct, as well as the basic policy of the Fair Labor Standards Act, requires reimbursement for wages lost as a result of a discriminatory discharge*

The legislative purpose and "main object" of the Fair Labor Standards Act's prohibition against discriminatory conduct (Section 15(a)(3), *supra*, p. 2) is to effectuate the minimum labor standards prescribed in its substantive provisions, by ensuring the effective enforcement so essential to attainment of the Act's "vital national policy" to establish minimum "economic standards consonant with national

well-being" (cf. *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 182, 186).<sup>3</sup> "The prohibition against 'discrimination in regard to hire' must be applied as a means toward the accomplishment of the main object of the legislation" (*id.* at 186). Because of the obvious practical fact that effective enforcement of the statutory minimum labor standards would be virtually dependent upon the willingness and freedom of employees to participate as claimants and witnesses without fear of economic loss at the hands of their employers, Congress was not content merely to provide enforcement procedures for violations of the standards themselves. The further prohibition of discriminatory practices was provided for the purpose of "protecting the exercise by workers of full freedom . . ." to participate in such enforcement procedures (cf. *Phelps Dodge, supra*, at 182-183). In evident recognition of the intimidatory economic pressures inherent in the employment relationship, particularly for the low-wage workers with whom this Act is primarily concerned, Congress undertook to protect workers "not merely in the exercise of their \* \* \* [substantive rights], but against the economic consequences of a legitimate assertion of those rights."<sup>4</sup>

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<sup>3</sup> Cf. "Finding and Declaration of Policy" in Section 2 of Fair Labor Standards Act: "to correct and as rapidly as practicable to eliminate the conditions above referred to," i.e., "conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."

<sup>4</sup> Cf. *National Labor Relations Board v. Killoren*, 122 F. 2d 609 (C.A. 8), certiorari denied, 314 U.S. 696.

"It is self-evident, we think, that it would materially aid in effectuating the policies of the Act, for the workmen in industry generally to feel assured that they would be protected, as fully as soundly possible, not merely in the exercise of their \* \* \*

The provisions of the Fair Labor Standards Act regulate week-to-week wage transactions between a vast number of business establishments and many millions of individual employees. It is not feasible, and would not be consistent with our national traditions, for compliance with the requirements of the Act to be policed by continuous governmental inspection of all payrolls. Enforcement must therefore depend mainly on the filing of complaints and the submission of information by employees who believe they have been denied their rights under the Act. The Act's pattern of enforcement is workable only if the aggrieved employee feels free to approach the enforcement authorities with his complaint. It is obvious that he is not free if he has cause to fear economic retaliation by the employer. This Court has long recognized that the economic dependence of employees upon their employer works powerfully upon them to accept substandard labor conditions rather than to expose themselves individually to his unfavorable attention. See *Holden v. Hardy*, 169 U.S. 366, 397; *West Coast Hotel v. Parrish*, 300 U.S. 379, 394; and *Brooklyn Bank v. O'Neil*, 324 U.S. 697, 706-708. It is commonplace knowledge that the prospect of permanent loss of several months' pay will cause em-

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[substantive rights], but against the economic consequences of a legitimate assertion of those rights. The experience of the Board, as reflected in its decisions, demonstrates the need for this assurance" [122 F. 2d at 612].

\* \* \*

"The purpose of a back pay allowance under the National Labor Relations Act \* \* \* is, as has been indicated above, to leave an employee, as nearly as possible, in the same situation that he would have occupied, if there had been no discrimination against him" [*id.* at 613].

ployees to "hesitate fearlessly to exercise their rights secured to them by the statute," just as effectively as the fear of permanent discharge (see *National Labor Relations Board v. Regal Knitwear Co.*, 140 F. 2d 746, 747 (C.A. 2), affirmed on other grounds, 324 U.S. 9). The recalcitrant employer thus has it in his power, in the absence of effective redress for wage losses caused by his discriminatory conduct, to choke off administrative and judicial enforcement at the outset. It is to this problem that Section 15(a)(3) addresses itself by expressly declaring such retaliation to be illegal:

The case at bar presents a clear instance of the need for full redress to employees of economic loss resulting from violations of Section 15(a)(3). Three employees who presumed to test their rights in proceedings authorized by law were promptly subjected to gross and open discrimination in the plant, and were shortly thereafter dismissed from employment (see the Statement, *supra*, pp. 3-4). The lesson not only to the particular employees discharged, but also to the remaining employees, was clear and explicit:—the employer would know how to deal with employees who appealed to law. Absent correction, it may be assumed that it would thereafter be a rare employee of respondents who would lay claim to his rights under the Act. By way of remedy, the court below directed future desistance from discrimination and reinstatement of the three employees to the payroll, but they were afforded no redress for the severe and continuing penalty already imposed on them in the form of a long period of unemployment. Under the decree as issued, they may return to work, but only in the chastening knowledge that it may be very costly for an employee

to seek redress through the legal procedures provided by the statute.

To accomplish the purpose of the Act, it is essential that the employee have assurance that, if he is injured by his employer for claiming his rights under the Act, the economic loss will be undone by process of law. "The experience of the [Labor] Board, as reflected in its decisions, demonstrates the need for this assurance" (see *National Labor Relations Board v. Killoren*, *supra*, pp. 15-16, fn. 4; and discussion of the labor relations decisions, *infra*, p. 22 *et seq.*).

If this assurance is denied, as by the decision below, then resort to the procedures of the Act becomes a gamble in which the employee is required to risk irremediable loss of full wages for an unpredictable period of unemployment, in order to gain restitution of partial deficiencies in wages due for periods in the past. Thus the effect of the decision below, if permitted to stand, would be not only to deny meaningful redress to the victimized employees, but also to advise all the employees in the respondents' plant, and in the community, and ultimately all the employees subject to the Act, that the guarantee against discrimination proclaimed by Section 15(a)(3) is only partial. In a word, the ruling vitiates the force of Section 15(a)(3) and operates to undermine the administrative and enforcement procedures essential to the attainment of the basic statutory policy, which, for the reasons stated above, depend heavily upon the participation of employees as complainants and witnesses.<sup>5</sup>

<sup>5</sup> Cf. *Phelps Dodge*, *supra*, 313 U.S. at 185: "The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of

## B

*When a court's equity jurisdiction is invoked under a regulatory statute, its inherent equitable powers are available to effectuate the legislative prohibitions and policy, unless the statute expressly provides otherwise.*

To read restrictively the general jurisdictional language of Section 17—"to restrain violations"—without regard to this main objective of the statutory prohibition of discrimination, as the court below did, is to miss the "central clue" to the scope of the jurisdiction intended and to reduce its substance to "a bit of verbal logic from which the meaning of things has evaporated" (*Phelps Dodge, supra*, 313 U.S. at 190-191). Both in reasoning and result, the decision below is at variance with this Court's numerous decisions dealing with various kinds of comparable regulatory legislation (labor relations laws, the anti-trust laws, price and rent control laws), which consistently apply the time-honored fundamental principle that it is the duty of a court, and within its inherent equity power, "to give effect to the policy of Congress" whenever its jurisdiction to restrain or enforce a legislative prohibition is invoked under the governing act, and "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Co.*, 328 U.S. 395, 398, 400. The application of this controlling principle does *not*

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organization. In a word, it undermines the principle which, as we have seen, is recognized as basic to the attainment of industrial peace."

depend upon authorization by Congress of specific types of equitable remedies or the use in the statute of special phrases such as "enforce compliance" or "effectuate policies" or "issue necessary orders". Rather, the principle is as broad as it was formulated in *Porter v. Warner Co.*

### 1. *The general principle.*

Contrary to the assumption of the court below (R. 21), the underlying principle applied in *Porter v. Warner Co.*, *supra*, was not one originated for and restricted to the terms and policy of the particular price-control legislation there involved. As explicitly stated in *Porter*, the source of the principle dates back to more than century-old decisions which recognized as fundamental law that whenever a court's equity jurisdiction is invoked, "it is the duty of the courts to execute the policy" of the legislature and to utilize the "inherent [power] in the courts of equity" to order such affirmative relief as will "give effect to the policy of the legislature" (*Clark v. Smith*, 13 Pet. 195, 203 (1839), cited in *Porter*, 328 U.S. at 400), and "[t]he great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." (*Brown v. Swan*, 10 Pet. 497, 503 (1836), quoted in 328 U.S. at 398).

Clearly the duty of the court to "give effect to the policy of the legislature" is no less when the exercise of its equity jurisdiction "to restrain violations" is expressly invoked by statute, as here. Thus, equally applicable to this case is the holding of *Porter* that since "a restitution order is appropriate and necessary to enforce compliance with the Act and to give effect

to its purposes" (328 U.S. at 400),<sup>6</sup> the court had power to direct such restitution unless authority to do so was denied "in so many words, or by a necessary and inescapable inference" (*id.* at 398).<sup>7</sup>

The decisions of this Court attest to the application of this basic principle to legislation providing no more, or even less, explicit jurisdiction than is conferred by Section 17 of this Act. While the statutes involved in *Porter v. Warner* and *Phelps Dodge* were more specific in describing the remedies for violations, both decisions upheld the court's power to order additional affirmative relief not explicitly authorized, on the ground that, because the jurisdiction granted was "an equitable one \* \* \*, the comprehensiveness of this equitable juris-

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<sup>6</sup> Although the jurisdictional language in the instant statute is limited to the phrase "to restrain violations" (Section 17), it is evident that an order "to restrain violations" requires nothing less than full compliance.

<sup>7</sup> It is clear from *Porter's* exposition of its underlying rationale that this ruling was not dependent upon the statutory phrase (in that Act) "or other order," as the court below assumed (R. 21). While the confirmatory effect of this phrase was noted (*id.* at 398-399), the decision was independently grounded on the premise that, because "the jurisdiction of the district court to enjoin acts and practices made illegal by the act" is "an equitable one" (*id.* at 397-398), "all the inherent equitable powers of the district court are available for the proper and complete exercise of that jurisdiction," "[u]nless otherwise provided by statute."

*United States v. Moore*, 340 U.S. 616, reaffirmed "the broad ground of interpretation of the 'other orders' provision adopted in the [*Porter v. Warner* case]—i.e., "the inherent equitable jurisdiction which is thus called into play \* \* \* to give effect to the policy of Congress" (*id.* at 619), in sustaining an order for the restitution of excess rents issued *without* an injunction. See also *Woods v. McCord*, 175 F. 2d 919, 921 (C.A. 9); *McCoy v. Woods*, 177 F. 2d 354, 355 (C.A. 4); and *Creedon v. Randolph*, 165 F. 2d 918, 920, in which the Fifth Circuit upheld a similar order on the authority of *Porter*, saying: "It is a remedy which may be had *in addition* to the others set up in the Act" (emphasis added).

diction is not to be denied or limited in the absence of a clear and valid legislative command" (*Porter*, 328 U.S. at 398).

As we shall show, the equitable jurisdiction to order affirmative relief to "neutralize" and "rectify \* \* \* existing wrongful conditions," including "quite drastic measures to achieve freedom from the influence of the unlawful" conduct, does not depend upon either explicit authorization of specific remedies, or upon an express authority to issue "other orders" to "effectuate the [statutory] policies." In particular, this Court's decisions dealing with labor relations statutes and with the anti-trust laws demonstrate beyond doubt, not only that general statutory authority "to restrain violations" includes the power to order reimbursement or reparation as an equitable adjunct to an injunction decree, but also that utilization of the reimbursement remedy, no less than of reinstatement, is essential to achievement of the purpose of this Act's prohibition of discriminatory conduct and to effectuation of its basic substantive policy.

## 2. *Labor relations decisions*

(a). As already indicated (*supra*, pp. 14-18,) the main objective of the Fair Labor Standards Act's prohibition of discriminatory discharge of employees is closely analogous to that of the prohibition of unfair labor practices in the National Labor Relations Act, i.e., to effectuate the substantive provisions and basic policy of the Act by providing that they be "safeguarded through the authority conferred upon the Board [here the courts] to require the employer to desist from the unfair labor practices described and to leave the employees free" to pursue legitimate action

(see *Republic Steel Corp. v. Labor Board*, 311 U.S. 7, at 10). As this Court has repeatedly recognized, the Labor Board's experience has revealed that effectuation of the important national policy of that Act "generally requires" both remedies—"not only compensation for the loss of wages but also offers of employment to victims of discrimination," because "[o]nly thus can there be a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination" (*Phelps Dodge, supra*, 313 U.S. at 194; *National Labor Relations Board v. Seven-Up Co.*, 344 U.S. 344, 345; *Republic Steel, supra*, 311 U.S. at 12). "Such a restoration of the situation as it would have been had the unfair labor practice not occurred is obviously needed to wipe out the coercive effect of the employer's conduct." See *National Labor Relations Board v. Waumbeec Mills*, 114 F.2d 226 at 235 (C.A. 1).<sup>8</sup>

As the Labor Board cases put it, restoration of wage losses, if not always an essential adjunct to reinstatement, is certainly the traditional appropriate "companion remedy of reinstatement," effectuation of the statutory policy depending upon "the practical interplay of [the] two remedies" (*Seven-Up, supra*, at 347, 348); reimbursement, no less than reinstatement, serves the function of "[m]aking the workers whole for losses suffered on account of an unfair labor practice," and is, therefore, as much a "part of the vindication of the

<sup>8</sup> It may be noted that the conflict between *Waumbeec Mills* and the Second Circuit's decision in *Phelps Dodge* (on the "main issue" whether the Board's powers included remedial orders not explicitly specified in the statute, see *infra*, pp. 27-28) led to the grant of certiorari and modification of the latter decision. See 313 U.S. at 181.

public policy which the Board enforces" (*Phelps Dodge, supra*, at 197). While undoubtedly "there are factors other than loss of wages \* \* \* to be considered" in giving effect to the declared statutory public policy, it has never been questioned that the reimbursement remedy is an appropriate, if not essential, adjunct to the "power to neutralize discrimination" and "to wipe out the prior discrimination" (*id.* at 192-193). The reimbursement remedy must be available to accomplish the purpose "to leave an employee, as nearly as possible, in the same situation he would have occupied, if there had been no discrimination against him" (*National Labor Relations Board v. Killoren, supra*, 122 F. 2d 609, 613). "[T]o limit the significance of discrimination" merely to reinstatement, no less than to limit its significance "merely to questions of monetary loss to workers," "would thwart the central purpose of the Act," (*cf. Phelps Dodge, supra*, at 193). For reimbursement to the victims of discrimination for wage losses is usually, if not always, as essential to "undoing the discrimination" and to "effective assurance" to employees of freedom to exercise their statutory rights as is reinstatement (*id.* at 193, 195).

Although reinstatement and back pay orders are today usually associated with the specific remedy provided by the National Labor Relations Act, long before the enactment of that Act such relief was recognized as an appropriate equitable measure to restrain violations of statutory prohibition of unfair labor practices and to correct or undo wrongs created by unlawful retaliatory discharge of employees. *Texas & N.O.R. Co. v. Railway Clerks*, 33 F. 2d 13 (C.A. 5), affirmed

281 U.S. 548.<sup>9</sup> As stated in *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 188, the authority of a court of equity to order reinstatement with back pay was upheld in *Texas & N.O. R. Co. v. Railway Clerks* “even without \* \* \* a mandate from Congress”. The same reasoning was followed in *Virginian Ry. Co. v. System Federation*, 300 U.S. 515, 552 (not a restitution case), in which the Court declared that “[m]ore is involved than the settlement of a private controversy without appreciable consequences to the public”, so that the bounds of equitable power assumed a broader and more flexible character than when only a private controversy is at stake (*ibid.*; see also *Porter v. Warner Co.*, 328 U.S. at 398). The fact that Congress in the Railway Labor Act made negotiation obligatory—as in Section 15(a)(3) of the Fair Labor Standards Act it has made discrimination unlawful—“is in itself a declaration of public interest and policy which should be persuasive in inducing courts to give relief” (300 U.S. at 552).

(b). We submit that there is no warrant for the

<sup>9</sup> In rejecting the contention that the rights created by the Railway Labor Act could not be enforced by legal proceedings because no remedy had been expressly given for redress, this Court said:

While an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms, a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded. \* \* \* If Congress intended that the prohibition, as thus construed, should be enforced, the courts would encounter no difficulty in fulfilling its purpose \* \* \*

\* \* \* As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated. [281 U.S. at 568-569; recently reaffirmed in *Leedom v. Kyne*, 358 U.S. 184, at 189.]

narrow view of these labor relations decisions taken by the court below, which rejected them as inapposite on the ground that the *Railway Clerks* case involved a reimbursement order issued in contempt proceedings and that *Phelps Dodge* involved an express statutory provision "to take such affirmative action" (R. 17). As the Second Circuit recognized in rejecting this distinction in *O'Grady* (146 F. 2d at 423), there is "little difference between giving reparation to an employee for loss of wages as ancillary to injunctive relief against withholding employment and giving back pay where an injunction for reinstatement has been violated \* \* \*." In either case, "such reparation is necessary to restore the status quo" disturbed by the employer's wrongful violation of the rights accorded by the statute (*ibid.*).

Far from limiting itself to considerations relating to contempt, the *Railway Clerks* decision proceeded on the general principle that a statutory legal right does not require an express statutory provision to make it enforceable, and that, since the statute imposed requirements upon the employer with respect to the employees' free choice of representatives, those requirements were "susceptible of enforcement by proceedings appropriate [thereto]," despite the silence of the statute as to enforcement (281 U.S. at 569-570). As indicated above, this reasoning was followed in *Virginian Ry. supra*, in which contempt was in no way involved. Relying solely on the substantive requirement of the statute that the employer "treat with" the certified representatives of its employees, and without any express statutory authority for enforcement by equitable decree, the Court sustained a mandatory injunction requiring

the railway to "treat with" the union and to "exert every reasonable effort to make and maintain agreements concerning rates of pay \* \* \* and to settle all disputes" (*id.* at 544). It was "not open to doubt," the Court said, that "Congress intended that this requirement \* \* \* be enforced by the courts" (*id.* at 545).<sup>10</sup>

The decision below likewise misreads *Phelps Dodge* as being dependent on the express statutory authorization in the National Labor Relations Act of back-pay orders. Although that authorization of "back pay" was limited to "reinstatement of employees," the Board's power to require offers of jobs to applicants "seeking new employment" and to order that they be

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<sup>10</sup> Significantly, both the District Court and the Court of Appeals in the *Railway Clerks* case, in holding the restitution order to be sufficiently grounded upon the equitable power to restore the *status quo ante* (25 F. 2d at 877; 33 F. 2d at 17), relied for authority on *Texas & New Orleans R.R. v. Northside Belt Ry.*, 276 U.S. 475, a case which was not a contempt proceeding, but an original suit for injunction. In turn, the *Railway Clerks* case has been cited by this Court as authority for the issuance of a back-pay order in proceedings under the National Labor Relations Act in which contempt of court (or of the Board) was not involved. *Phelps Dodge*, 313 U.S. at 188. Cf. also *Steele v. L. & N.R. Co.*, 323 U.S. 192, holding that, since the Railway Labor Act made no express provision for the enforcement of the right it conferred upon each railroad employee to be represented by the statutory exclusive bargaining agent of his unit, the statute must be taken as "contemplat[ing] resort to the usual judicial remedies of injunction and award of damages when appropriate for breach of that duty" (*id.*, at 207). The Court rested its holding on the principle expressed *obiter* in *Switchmen's Union v. National Mediation Board* (320 U.S. 297, 300) as being the "purport" of the *Railway Clerks* and the *Virginian Ry.* cases: "If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control." The Court has had recent occasion to confirm this principle in *Leedom v. Kyne*, 358 U.S. 184, 189-190.

“made whole for their loss of pay” was sustained (313 U.S. at 188, 189, 196-197). The Board’s power to make such an order “does not derive” from the statutory language relating to “back pay,” said the Court, “and is not limited by it” (*id.* at 191), but derives from the more general jurisdiction of the Board to “effectuate the policies” of the Act (*id.* at 189).<sup>11</sup> See also *Aguilines v. National Labor Relations Board*, 87 F. 2d 146, 151, where the Fifth Circuit recognized that “[s]tatutory provisions of this kind in the public interest \* \* \* provide for public proceedings, equitable in their nature [and] exert power to restore status disturbed in violation of statutory injunction similar to that exerted by a chancellor in issuing mandatory orders to restore status” (citing among others the *Railway Clerks* and the *Northside Belt* decisions, *supra*). In short, the Board’s power to issue such orders derives from its authority, equivalent to that inherent in the jurisdiction of a court of equity, “without such a mandate from Congress,” “to enforce the legislative policy against discrimination” (*id.* at 188). The same considerations compel the conclusion that the reimbursement remedy is also within a court’s jurisdiction “to restrain violations” of the Fair Labor Standards Act’s prohibition against discriminatory practices.<sup>12</sup>

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<sup>11</sup> To the same effect, see *National Labor Relations Board v. Waumbee Mills*, 114 F. 2d 226, 234-235 (C.A. 1) (holding that the express authorization in the National Labor Relations Act did not prescribe the limits of the Board’s power to issue back pay orders, but was “probably inserted out of abundant caution to illustrate a type of relief appropriate to [a] commonly recurring [type of] unfair labor practice”).

<sup>12</sup> See *Regal Knitwear Co. v. Labor Board*, 324 U.S. 9, at 14, where it is noted that “an injunction to restrain violation of the Fair Labor Standards Act \* \* \* is somewhat analogous to Labor Board orders \* \* \*.”

That there is no provision in the Fair Labor Standards Act expressly authorizing orders to "effectuate" the Act merely reflects the fact that the enforcement of this Act, like the Railway Labor Act (see *supra*, pp. 24-27) and the anti-trust laws (see *infra*, p. 30 *et seq.*), is directly entrusted to courts of equity. Instead of creating an administrative agency or board with only such powers as the statute confers, the Fair Labor Standards Act relies on the pre-existing system of courts in possession of traditional powers needing no confirmation. Such a statute has no need to specify the powers to be used in the exercise of the jurisdiction granted, but must rather specify the particular powers intended to be excluded (if any), as is done in the proviso to Section 17 discussed below (pp. 35-40).<sup>13</sup> That the exercise of such equity powers does not depend upon an express statutory direction to "effectuate the policies" of the Act is conclusively demonstrated, we submit, by the anti-trust decisions, which have con-

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<sup>13</sup> In conformity with this view, see *United States v. International Longshoremen's Ass'n*, 147 F. Supp. 425 (S.D. N.Y.), where a mandatory order was issued under a statutory provision which merely granted authority, under stated conditions, to "enjoin [an emergency] strike or lock-out or the continuing thereof" (Labor Management Relations Act of 1947, Sec. 208, 61 Stat. 155, 29 U.S.C. 178). Having issued an order enjoining continuance of a strike under this provision, the court added the requirements that the employees be paid for the duration of the injunction at the rates fixed by the expired contract, and that any wage adjustments reached in settlement negotiations be made retroactive. As in the cases discussed above, there was no provision for such orders in the statute; they were devised by the court as appropriate adjuncts to the expressly authorized injunction in order to meet the equities of the case before it; "[p]lainly," the court said by way of explanation, "equity requires that if employees are to be restrained from striking during this cooling-off period the employers must equally be restrained from reducing their pay" (147 F. Supp. at 427).

sistently recognized the power (and duty) of the court to issue affirmative orders similar to, and fully as broad in scope as, the Labor Board's orders. See *infra*, pp. 30-34.

### 3. *Anti-trust decisions*

The jurisdiction conferred by the Anti-Trust Act to "prevent and restrain violations" (26 Stat. 209, Section 4; 15 U.S.C. 4)—language precisely equivalent to that of Section 17 of the Fair Labor Standards Act—has always been construed as including "the duty to enforce the statute" by "the usual powers of a court of equity to adapt its remedies" to the execution of the statutory policy, including "the application of broader and more controlling remedies" than the mere "prohibition of future acts." *United States v. United States Steel Corp.*, 251 U.S. 417, 451-452; *Standard Oil Co. v. United States*, 221 U.S. 1, 77-78; *United States v. American Tobacco Co.*, 221 U.S. 106, 184-185. Significantly, the standards for determining the scope of affirmative relief authorized in anti-trust decrees have been stated in terms virtually identical to the standards applied in the Labor Board cases, i.e., to "neutralize," "wipe out," or "undo" the continuing effects of past unlawful conduct, and to "redress" wrongs and restore "as near as possible \* \* \* the [prior] *status quo*." *International Boxing Club v. United States*, 358 U.S. 242, 258.

In the early decisions, it was specifically held (while noting that "penalties which are not authorized by law may not be inflicted by judicial authority") that "the application of remedies two-fold in character" was available and "essential" "to the end that the pro-

hibitions of the statute may have complete and operative force"—i.e., in addition to (1) forbidding future acts violative of the statute, (2) "[t]he exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about" (*Standard Oil Co. v. United States*, 221 U.S. at 77-78). It was assumed, without question, that the authority "to prevent and restrain violations" included "[t]he duty of giving complete and efficacious effect to the prohibitions of the statute" and, therefore, the power "to award relief coterminous with the ultimate redress of the wrongs which we find to exist" (*American Tobacco*, 221 U.S. at 184-185) and to remedy "the condition which has been brought about in violation of the statute" (*Standard Oil*, at 77).

As noted in the more recent anti-trust decisions, this Court "has quite consistently recognized \* \* \* that the government should not be confined to an injunction against further violations." *United States v. Crescent Amusement Co.*, 323 U.S. 173, 189. The Court has held that "The court was bound to frame its decree so as to suppress the unlawful practices and to take such reasonable measures as would preclude their revival" (*Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 461), and that "[t]he essential consideration is that the remedy shall be as effective and fair as possible in preventing continued or future violations \* \* \*" —that "[t]he purpose of the decree \* \* \* is effective and fair enforcement" (*United States v. National Lead Co.*, 332 U.S. 319, 335, 338). It has been recognized that in the enforcement of the Anti-Trust Act the courts

may exercise "equity's authority to use quite drastic measures to achieve freedom from the influence of the unlawful restraint" and may order such affirmative action as might be "reasonably necessary to wipe out the illegal [fruits]" thereof (*United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 726).

Accordingly, in *Bausch & Lomb* an order directing the cancellation of resale price maintenance contracts theretofore executed was upheld; and the Court has repeatedly sustained orders requiring the divestiture of interests, the "undoing" of the continued effect of unlawful conduct, and similar corrective measures "conducive to the elimination of the old illegal practices." *International Boxing Club v. United States*, 358 U.S. 242, 253-261; *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 126-130; *United States v. Paramount Pictures*, 334 U.S. 131, 170-174; *United States v. Griffith*, 334 U.S. 100; *United States v. Crescent Amusement Co.*, 323 U.S. at 189-190; *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 78.

None of these orders was within powers "expressly conferred" by the anti-trust law under which they were issued, or "necessarily implied" by any specific provisions of that Act—as would be required by the test laid down by the court below. They were sustained on the ground that, in a suit "to restrain violations," the function of the district court "does not end with enjoining continuance of the unlawful restraints nor with dissolving the combination which launched the conspiracy [but] includes undoing what the conspiracy achieved"; for "[o]therwise, there would be reward from the conspiracy through retention of its fruits" (see *Paramount Pictures*, 334 U.S. at 171), or a con-

tinuation of "the condition which has been brought about in violation of the statute" (*Standard Oil*, 221 U.S. at 77-78), which "is itself the violation" (*International Boxing Club*, 358 U.S. at 253). Because of the court's "duty to enforce the statute," as this Court has often held, these remedies are available to "neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about" (*Standard Oil*, 221 U.S. at 78), to "rectify such existing wrongful condition" (*American Tobacco*, 221 U.S. at 185), and "to return the parties as near as possible to the *status quo* existing prior to the conspiracy" (*International Boxing Club*, 358 U.S. at 258).

Indeed, such a remedial equitable measure need not even be viewed merely as *ancillary* to the injunctive relief specified by the statute. In a case such as this, the reimbursement decree is in itself an order to "restrain violations" within the express terms of Section 17 of the Fair Labor Standards Act. For the discrimination forbidden by the Act does not cease upon the reinstatement of the employee, if he returns irremediably disadvantaged by the loss of income for the prior period. Its intimidating effect to deter employees from legitimate participation in the enforcement of the statutory standards remains as a "continually operating force," which the employer's unlawful conduct "has brought and will continue to bring about," in defiance of the statutory policy. This continuing condition "is itself the violation." See *Standard Oil Co. v. United States*, 221 U.S. 1, at 77-78, *International Boxing Club v. United States*, 358 U.S. 242, 253, and the other anti-trust decisions, discussed *supra*, p. 30 ff.). Unless the

employer is required to equalize the positions of those employees who participated in proceedings under the Act and those who did not, the discrimination continues, as does the consequent pressure upon employees to accept violations of the Act without protest. An injunction directed only to new discriminations would not restrain these continuing violations or protect the public interest as Congress intended. Only a reimbursement order could terminate the existing state of discrimination and intimidation.

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In short, the ground on which the court below rested its decision is plainly inconsistent with the fundamental principle—repeatedly recognized by this Court in rulings on various types of legislation comparable to the Act here in issue—that it is the duty of the court under its inherent equity power to “give effect to the policy of Congress,” and to grant whatever affirmative relief is appropriate to that end, whenever its jurisdiction to restrain or enforce a legislative prohibition is invoked, unless that power has been restricted expressly or by necessary implication. There is nothing in the language, the legislative history, or the substantive context of the Fair Labor Standards Act to suggest that this basic principle is not equally applicable here; on the contrary, every pertinent consideration requires the application of the principle to the jurisdiction granted by this Act to restrain the discriminatory conduct prohibited by Section 15 (a) (3).<sup>14</sup>

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<sup>14</sup> If any discretion be deemed to be lodged in the district court to refrain from ordering restitution in certain cases, certainly this is not such a case. The court found the discrimination exercised

## C.

*The Proviso Added to Section 17 by the 1949 Amendment Does Not, By Its Terms or Legislative Intent, Limit the Court's Jurisdiction to Order Reimbursement for Wage Loss Resulting from Discriminatory Discharge*

The Fair Labor Standards Amendments of 1949 added to Section 17 (*supra*, p. 3) the following proviso:

\* \* \* *Provided, That no court shall have jurisdiction, in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.* [Emphasis added.]

As the court below correctly recognized, this proviso, in terms, deals "solely with the minimum wage and overtime compensation provisions" (R. 20), and not with the discrimination provision which alone is pertinent here. Accordingly, although its rejection of the Second Circuit's *O'Grady* decision (*supra*, pp. 13-16) seems to have been influenced by the view that Congress intended by the proviso to "repudiate the doctrine of the *O'Grady* case," the court below expressly dis-

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by respondents to be "clear and convincing" (R. 11; Concl. 4) and it found no mitigating circumstances whatever. There were, in actual fact, no mitigating circumstances so far as the employer's conduct was concerned; and, with respect to at least one of the discharged employees (Elizabeth Duke), there were no circumstances enabling any mitigation at all of the resulting wage losses. See the Statement, *supra*, pp. 3-4, 5, fn. 1.

claimed reliance on the proviso as a ground of decision (*ibid.*). Its view of the Congressional purpose in enacting the proviso, however, is just as erroneous as its position on the scope of the jurisdiction conferred by Section 17 prior to the 1949 amendment.

The proviso was enacted shortly after the decision in *McComb v. Scerbo*, 177 F. 2d 137, in which the Second Circuit, in a proceeding under Section 17, sustained an order requiring an employer to reimburse his employees for *unpaid minimum wages and overtime compensation*. There had theretofore been other cases in which orders for the restitution of such deficiencies had been issued. *Fleming v. Alderman*, 51 F. Supp. 800 (D. Conn.); *Walling v. Miller*, 138 F. 2d 629 (C.A. 8), certiorari denied, 321 U.S. 784 (in which the majority opinion sustained the order on the ground that the employer had not objected below, with Judge Woodrugh concurring on the ground that a back-pay order was authorized and indispensable in the premises); and *Fleming v. Warschawsky Co.*, 123 F. 2d 622 (C.A. 7), enforcing a consent order in contempt proceedings. In addition, the *O'Grady* decision had sustained a back-pay order for reimbursement for wage losses in a *discrimination* case. 146 F. 2d 422.

Accordingly, when the proviso was enacted in 1949, the existing case law was to the effect that restoration or reimbursement orders were authorized regardless of the type of violation found. A "repudiation" of the *O'Grady* decision could easily have been effected by an unqualified general withdrawal of the power to order any monetary reimbursement for prior violations. But, instead, Congress carefully articulated a withdrawal of

restitution power which precisely prescribed the orders in the *Scerbo* type of case, and in language inapplicable to the type of order in *O'Grady*.

The reason for the precise delimitation of the proviso is clear from a consideration of a related amendment simultaneously enacted. That change added Section 16(c) to the Act, authorizing the Secretary of Labor, for the first time, to bring suits *at law* to recover "the unpaid minimum wages or the unpaid overtime compensation" claimed "under section 6 or section 7 [the compensation provisions] of this Act." This authority was in addition to (but conditioned upon waiver of) the already existing authority in Section 16(b) for employees themselves to sue for "their unpaid minimum wages, or their unpaid overtime compensation \* \* \* [and] additional equal amount as liquidated damages."

The inference is inescapable that the two 1949 amendments were meant to complement each other, and that recourse in equity was being withdrawn by the new proviso to Section 17 because a corresponding remedy at law was being provided by the new subsection of Section 16. This inference is confirmed by the report of the House Conferees on the insertion of the proviso into the bill in conference. The conferees reported:

This proviso has been inserted in section 17 of the act in view of the provision of the conference agreement contained in section 16(c) of the act which authorizes the Administrator in certain cases to bring suits for damages for unpaid minimum wages and overtime compensation owing to

employees at the written request of such employees.<sup>15</sup>

Since, as the House Conferees' report notes, the new Section 16(c) relates to suits for underpayments due under the compensation provisions of the Act, the conferees' explanation of the Section 17 proviso's origin leaves no doubt that the formulation of the provision in terms appropriate only to violations of the compensation provisions was intentional. There is no basis for the inference drawn by the court below that, when the conferees reported that the proviso "would have the effect of reversing such decisions as *McComb v. Scerbo*" (*ibid.*), the *O'Grady* case was one of the decisions the conferees had in mind (R. 20): As noted above (p. 36), there were outstanding other decisions like *Scerbo* (involving retention for underpayments of minimum wage and overtime compensation).

The enactment of the proviso in 1949, in prohibiting specified types of reimbursement orders, confirmed the conclusion theretofore reached by the courts (*supra*, p. 36) that reimbursement orders are within the Section 17 jurisdiction "to restrain violations," except as specifically excluded. In omitting the *O'Grady* type of order from those specified for future exclusion, the action of Congress in enacting the proviso constituted, we submit, a confirmation rather than a repudiation of *O'Grady*. In the only case, other than the instant

<sup>15</sup> Statement of the Managers on the Part of the House, Rept. No. 1453 on H. R. 5856, 81st Cong., 1st Sess., p. 32. See also Report of the Majority of the Senate Conferees, 95 Cong. Rec. 14879, to the same effect. The House Statement is the legislative history to which the trial court referred in its Conclusions of Law by its citation to U.S. Code Congressional Service, 1949, p. 2272 (Concl. 5, R. 11-12).

one, in which a discriminatory discharge was proved after the enactment of the proviso, a back-pay order was held to be authorized. *Mitchell v. Equitable Beneficial Co.*, 13 WH Cases 606 (D.C. N.J., March 11, 1958, not officially reported).

Unlike damages resulting from unpaid compensation, if relief is not available under Section 17 for financial loss resulting from unlawful discharge, then relief is not available under the Fair Labor Standards Act at all. The damage suits authorized by Sections 16(b) and 16(c) are expressly limited to suits for the recovery of Sections 6 and 7 wage underpayments, and there is no provision for recovery of damages for unlawful discharge. *Powell v. Washington Post Co.*, C.A.D.C., 14 WH Cases 140, certiorari denied, June 29, 1959, No. 937, Oct. Term 1958; *Bonner v. Elizabeth Arden, Inc.*, 177 F. 2d 703, 705 (C.A.2). Criminal prosecution under Section 16(a) is likewise ineffective to achieve the full objective of Section 15(a)(3), for the employee is not freed from the intimidation inherent in his vulnerability to economic loss at the hands of his employer by the knowledge that his employer may have to account to the Government.<sup>16</sup>

There is, thus, special reason for application of the principle that the court's "equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command" and "not be yielded to light inferences, or doubtful construction" (*Porter v. Warner Co.*, *supra*, 328 U.S. at 398). Since the view expressed by the decision below is, at the very least, a

<sup>16</sup> In the instant case, the payment of a substantial fine by the employer, in the criminal prosecution for violations of the Act's substantive requirements, did not protect the employees from discriminatory discharge a few weeks later (*supra*, pp. 3-4).

"doubtful construction" of the proviso to Section 17, there is no warrant for straining to draw the unsubstantiated inference that Congress intended to exclude the essential reimbursement remedy for losses resulting from discriminatory conduct. As stated in *O'Grady*, since "an injunction to prevent its continuance would have been proper under Section 17 as soon as the discharge took place", it is "unreasonable to suppose that the failure immediately to prevent it left the employee without remedy for loss of wages in the meantime \* \* \*" (146 F. 2d at 423). In the absence of express or clear evidence of legislative intent to the contrary, we submit that doubt should be resolved in favor of this "equitable remedy designed in the public interest to undo what could have been prevented had the defendants not outdistanced the government in their unlawful project." Cf. *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 128.

#### CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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AUGUST, 1959.

## APPENDIX

The pertinent provisions of the Fair Labor Standards Act, Act of June 25, 1938, c. 676, 52 Stat. 1060, as amended by the Fair Labor Standards Amendments of 1949 and of 1955, c. 736, 63 Stat. 910; c. 867, 69 Stat. 711, 29 U.S.C. 201 *et seq.*, are as follows:

## MINIMUM WAGES

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—(1) not less than \$1 an hour; \* \* \*

## MAXIMUM HOURS

SEC. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

## PROHIBITED ACTS

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

\* \* \* \* \*

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Secretary issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee; \* \* \*.

## PENALTIES

\* \* \* \* \*

SEC. 16. (b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated \* \* \*.

(c) The Secretary of Labor is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 6 or section 7 of this Act, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidate damages. When a written request is filed by any employee with the Secretary claiming unpaid minimum wages or unpaid overtime compensation under section 6 or

section 7 of this Act, the Secretary may bring an action in any court of competent jurisdiction to recover the amount of such claim: \* \* \* The consent of any employee to the bringing of any such action by the Secretary, unless such action is dismissed without prejudice on motion of the Secretary, shall constitute a waiver by such employee of any right of action he may have under subsection (b) of this section for such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. \* \* \*

#### INJUNCTION PROCEEDINGS

SEC. 17. The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands shall have jurisdiction, for cause shown, to restrain violations of section 15: *Provided*, That no court shall have jurisdiction, in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.